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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HARTLEY MARINE CORP., THE OHIO RIVER COMPANY, and CROUNSE CORPORATION,
Petitioners,
v.
JAMES H. PAIGE III, STATE TAX COMMISSIONER OF WEST VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF COMMITTEE ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTORY STATEMENT

This brief is submitted by the Committee On State Taxation as *amicus curiae* in support of the petitioners in the above-captioned matter. Written consent of the petitioners and respondent have been obtained and filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The Committee On State Taxation ("COST") is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce. COST, which was separately incorporated on December 11, 1991, has a membership of over 430 major

multistate corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

The tax at issue in this case has a disproportionate impact on the cost of engaging in interstate commerce in this country. COST's membership includes *many* companies that utilize the various inland navigable waterways, including the Ohio River, to transport natural resources and tangible products manufactured or sold by them to locations both within and without the United States. Transportation companies typically incorporate the costs they incur in transporting customers' goods (including fees and taxes imposed on the shipping operations) into their shipping fee schedules; therefore, the weight of an unconstitutional tax presses upon the market of the service being taxed directly or indirectly. Of course, the ultimate burden of this fuel use tax falls on individual consumers of the goods that were transported on the Ohio River by COST members and other companies.

It seems clear that West Virginia's Supreme Court of Appeals has launched a broadside at the import of over 200 years of federal constitutional, treaty, and statutory law establishing a literal "safe harbor" from taxation for commerce conducted on our inland waterways. West Virginia's example serves as a navigational chart for other states bordering inland waterways, and the cumulative effect of permitting one such fuel use tax will be a slew of such taxes enacted without any regard for either the constitutional or the economic implications thereof. Therefore, COST has an interest in this case.

SUMMARY OF ARGUMENT

The object sought by the federalists who executed the Northwest Ordinance, the Virginia Compact, and the Constitution's Duty of Tonnage Clause was the free and unimpeded travel upon inland waterways. It is clear that the

economic and political stakes attached to such an object were tremendous during our country's beginnings; but the fact that those stakes were defined two centuries ago does not render them any less important today.

The United States government has vested itself with responsibility for the regulation, servicing and maintenance of the inland navigable waterways system of which the Ohio River is a part. This responsibility is manifested through regulatory and police activity of the United States Coast Guard with respect to vessels traveling the waterways; planning, engineering, construction and operation of all locks and dams on the Ohio River by the United States Army Corps of Engineers; and imposition of a federal fuel use tax, dedicated to maintenance and improvement of the inland waterways, by the federal government. Petition, pp. 8-9.

West Virginia's fuel use tax imposed on barges traveling on the Ohio River conflicts with the broadly preemptive federal regulation (including taxation) of navigable inland waterways. Were it not for the fact that this Court's Duty of Tonnage jurisprudence contemplates the validity of imposing a limited charge, for just reimbursement of costs of improvements to ports for which a State may exact a reasonable toll, there would be no question but that the tax at issue is invalid. *See, e.g., Clyde Mallory Lines v. Alabama,* 296 U.S. 261 (1935). Nevertheless, application of the principles informing this Court's Duty of Tonnage decisions results in the identical conclusion; *i.e.,* the fuel use tax is invalid. The State of West Virginia has made no improvements to the Ohio River generally, for which it can reasonably exact a reasonable toll; barge operators are subject to this tax regardless whether they ever "enter, trade in or lie" in an Ohio River port; and no portion of the tax at issue is devoted to improvements to the navigable waterways of the Ohio River, as the tax is dedicated to maintenance of West Virginia roadways. In short, there is no basic fair-

ness concern in this case that justifies sustaining the State's fuel use tax as against a challenge under the Duty of Tonnage Clause—because there has been no *quid pro quo*.

ARGUMENT

THE UNIFIED FEDERAL INTEREST IN PROTECTING TRAVEL UPON INLAND NAVIGABLE WATERWAYS, AS REFLECTED IN THE COMPREHENSIVE FEDERAL REGULATORY SCHEME, PRECLUDES WEST VIRGINIA FROM IMPOSING THE FUEL USE TAX AT ISSUE.

A cursory review of the relevant provisions of federal law is all that is required to discern the trespass committed by the West Virginia fuel use tax at issue in this case:

Supremacy Clause:

"This Constitution and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ." U.S. Const., art. VI, cl. 2.

Northwest Ordinance of 1787:

"The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor." Articles of Compact, art. IV, U.S.C.A. Const. Art. 1 The Organic Laws of the United States.

Virginia Compact of 1789:

"The use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory

which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and the proposed state on the river as aforesaid shall be concurrent only with the states which may possess the opposite shores of the said river." 13 Henning's Stat. at L., c. 14, § 11.

Duty of Tonnage Clause:

"No State shall, without the Consent of Congress, lay any Duty of Tonnage. . . ." U.S. Const., art. I, § 10, cl. 3.

Rivers and Harbors Appropriation Act of 1884:

"No tolls or operating charges whatever shall be levied upon or collected from any vessel, dredge, or other water craft for passing through any lock, canal, canalized river, or other work for the use and benefit of navigation, now belonging to the United States or that may be hereafter acquired or constructed;. . . ." 33 U.S.C. § 5.

On their faces, these federal mandates and prohibitions do not contemplate or tolerate a tax such as West Virginia has imposed on Ohio River traffic in this case. In fact, the diverse manifestations of preemptive intent constitute unambiguous evidence of the overriding concern our founding fathers had that travel and trade conducted upon inland waterways be and remain free and unimpeded.

The Duty of Tonnage Clause particularly precludes the exercise by states of "levies upon the privilege of access by vessels or goods to the ports or territorial limits of a state." *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 265 (1935). In fact, that Constitutional prohibition was designed by the Framers to supplement the Import/Export Clause, Art. I, § 10, cl. 2, which denies states

the power to lay duties on imports or exports; as this Court recognized in *Clyde Mallory*, "[i]f the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise." *Id.* at 264-265.

Nevertheless, this Court has, in the interest of basic fairness to state and local jurisdictions that have intentionally expended funds to improve the safety and efficiency of ports lying on inland navigable waterways, approved charges made as a reasonable compensation for services rendered to and enjoyed by a vessel. In *Clyde Mallory*, this Court cited with approval charges made by the state for services to vessels including pilotage, wharfage, charges for the use of locks on a navigable river, and fees for medical inspection. *Id.* at 266 (citations omitted). The fees at issue in *Clyde Mallory* were imposed on all vessels entering the Port of Mobile, and were adopted pursuant to a resolution declaring the fees were " 'for the purpose of meeting the expense attendant upon the supervision of the port and the execution of the regulations and providing for the proper accommodation of vessels at this port.' " *Id.* at 264. Although the specific vessels that are required to pay such fees may not directly receive special assistance, this Court noted that "[t]he benefits which flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it." *Id.* at 266.

It may be argued that the Duty of Tonnage Clause does not apply to charges imposed on the consumption of fuel while plying the waterways, rather than for access to ports. If this is true, then the State of West Virginia has *no* exception available to it from the generally preemptive federal regulatory scheme impacting inland waterways, that would validate its fuel use tax. Assuming that the Duty of Tonnage has a broader application, in keep-

ing with the philosophy underlying its enactment, the State of West Virginia still falls outside the narrow exception for charges that constitute a fair *quid pro quo* for a state's expenses on behalf of water traffic.

The Duty of Tonnage analysis, as articulated in *Clyde Mallory* and applied in subsequent cases decided in the state courts, clearly invalidates the fuel use tax at issue in this case. West Virginia's tax is not imposed on vessels as reasonable compensation for improvements made to the Ohio River waterways or ports, or for services rendered to and enjoyed by vessels navigating the Ohio River. In fact, the tax statute itself mandates that the fuel use tax revenues at issue will be devoted to maintenance and improvements to West Virginia roadways. Petition, pg. 7. Therefore, there is no basic fairness concern in this case that justifies sustaining the State's fuel use tax, because there has been no *quid pro quo*. *Cf. Indiana Port Comm'n v. Bethlehem Steel Corp.*, 653 F. Supp. 604 (N.D. Ind.), *aff'd on other grounds*, 835 F.2d 1207 (7th Cir. 1987) (tax levied on vessels based upon a proxy for weight violates the Duty of Tonnage Clause where not justified as compensation for services to such vessels); *Reinhardt v. Anne Arundel County*, 31 Md. App. 355, 356 A.2d 917 (1976) (tax on boat owners using commercial docks, versus their own facilities, upheld); *Plaquemines Port, Harbor & Terminal District v. Federal Marine Commission*, 838 F.2d 536 (D.C. Cir. 1988) (fee charged for purposes of meeting expenses incurred in supervision of port and execution of its regulations upheld); *Randal T. Barber & Hawaiian Navigable Waters Preservation Society v. State of Hawaii*, 42 F.3d 1185 (D. Hi. 1994) (although restroom facilities and other services are available to public as well, court upheld fee charged for provision of such services plus mooring and anchoring).

CONCLUSION

For the reasons set forth above, the Committee On State Taxation respectfully requests that the Court grant a writ of certiorari and reverse the decision of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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